



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2012-049**

**KENNETH WASHINGTON**

**APPELLANT**

**VS.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET  
DEPARTMENT OF EDUCATION  
JOE MEYER, APPOINTING AUTHORITY**

**APPELLEE**

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This matter came on for an evidentiary hearing on August 30, 2012, and September 11, 2012, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Kenneth Washington, was present but was not represented by legal counsel. Appellee, Education and Workforce Development Cabinet, was present and represented by the Hon. Lisa K. Lang.

**BACKGROUND**

1. The Appellant, Kenneth Washington, is a classified employee with status who is employed as an Administrative Section Supervisor at the Kentucky School for the Blind ("KSB"). On February 28, 2012, he filed a timely appeal with the Personnel Board for his failure to be promoted into the position of Assistant Director, Division of District Support in the Kentucky Department of Education ("KDE"). Appellant provided the following statement of facts relating to his appeal:

As a Merit employee and an Internal Mobility candidate (with Veteran status), I was denied a fair opportunity for career advancement with KDE. This unfair act was directly related to my race, color, and sex; it was a deliberate, malicious, and deceitful act of politics by the Leadership of KDE.

2. By Interim Order dated April 30, 2012, it was established that the issues for the evidentiary hearing were whether or not Appellee complied with KRS 18A.0751(4)(f) and 101

KAR 1:400 in appointing Susan Smith Barkley to the position. As the burden of proof was placed on the Appellant, he went first in the presentation of proof.

3. Appellant called **Soraya Matthews** as his first witness. In January 2011, Ms. Matthews was employed as an Administrative Section Supervisor for the Kentucky Department of Education (KDE). Her job entailed the general oversight of both the Kentucky School for the Blind (“KSB”), and the Kentucky School for the Deaf (“KSD”) in that she was the first-line supervisor of the schools’ Directors of Instructions and Programs, Outreach, Operations and Technology.

4. Appellant, Director of Operations, at KSB, approached Matthews sometime in January 2012 and asked if she would write a letter of recommendation for him, as he was interested in applying for the newly-posted position of Assistant Director, at the KDE. Matthews told Appellant she would be happy to because she was “very pleased with his performance in his current job, and felt that he was more than capable of performing the Assistant Director’s job.” She wrote the recommendation letter on January 12, 2012, which reads in part: “[Appellant] provides leadership and oversight over the following areas: Fiscal Resources including Capital Projects, Maintenance, Housekeeping and Food Service.”

5. Appellant began his employment with KSB on February 1, 2011. In August 2011, after he had completed his six month probationary period, Matthews and Appellant met to informally discuss his job performance, which Matthews rated as “really good.”

6. On cross-examination, Matthews was asked if she knew the required qualifications for the Assistant Director position. She stated she had reviewed the job posting and felt that Appellant was capable of doing the job.

7. Matthews was asked what experience Appellant had in the areas of “pupil attendance” and “school calendar.” Matthews answered that he had none in pupil attendance, but he does participate in the leadership team that discusses the KSB school calendar. He is also responsible for creating the “Tornado/Evacuation Drills” calendar, as well as overseeing the facilities calendar which tracks all events outside of routine KSB work.

8. As for Appellant’s participation in Support Education Excellence in Kentucky (“SEEK”) funding, Matthews stated he had no job duties related to the particular program, but was involved in KSB’s Capital Construction State Allotment fund, which she estimated to be \$650,000, and KSB’s Major Maintenance Fund, which she estimated to be \$120,000. She added that SEEK-funding was derived from the legislative process, and districts get funds based on the number of students going to school there.

9. Matthews admitted that Appellant did not work in the areas of Tax Rates, School Bonds, or the Legislative Bill Review Process. “As for transportation of pupils,” Appellant did make sure the school buses were properly maintained and inspected and that the campus was

safely accessible for buses. And while he did not supervise the School Health Services Department, he did provide operations support to the Health Services Center.

10. Matthews was last queried on Appellant's involvement in "Architectural Design." She stated that Appellant routinely works with the contractors who create the architectural plans at KSB.

11. **Rebecca Ogden** is a Human Resource Branch Manager for KDE. She is responsible for posting positions, requesting registers and forwarding them to the hiring managers. The managers can review applications on-line, and then give Ogden the names of those applicants they would like to interview. The list of interviewees is given to the Personnel Cabinet to determine if these individuals meet the Minimum Qualifications for the job. The list of qualified applicants is forwarded to Ogden who calls the applicant to schedule an interview.

12. Ogden stated that there were no state rules specifically regarding the make-up of the interview panel, but internal policy was that the policy must have at least three members, one of whom must be a minority. It is left up to the hiring manager to determine exactly which documents the panel receives in regard to the applicants, but each panel member always gets a confidentiality agreement to sign, a list of questions to ask the applicants, and, usually, a copy of the application.

13. Ogden was asked if it was important that the confidentiality agreement be dated. She responded, "In my opinion that is not a big deal. There is an assumption of the date - - I know when the interviews are held."

14. Ogden was asked what her definition of seniority is. She responded, "Experience in your field or area . . . how many years you were in a position." Ogden stated that she did not think that "seniority" was defined in the pertinent administrative regulation, though she did agree that Appellant, as a current state employee, would have seniority over an outside candidate in the area of "months of state service."

15. Ogden was asked to define "pre-selection." She defined it as a serious offense when the "hiring agency requests a register already knowing who they are going to hire."

16. As for how long it typically takes between the time the hiring manager chooses the successful applicant and when the job is actually offered, Ogden stated that it varies. Generally speaking though, Ogden estimated that one week was the average amount of time that transpired between choosing the successful applicant and officially offering the job.

17. KDE adopted the Personnel Cabinet's Affirmation Action Plan, Ogden stated, and added that if an applicant's race is known, minority candidates are encouraged to be interviewed.

18. Ogden was asked to refer to a Settlement Agreement between Kathy Jennings and KDE, approved by the Personnel Board on July 14, 2011. Ogden testified that this appeal

concerned the appeal of changing Jennings' workstation from KSB in Louisville to Frankfort. When her workstation was changed back to KSB she agreed to "drop her appeal."

19. On cross-examination, Ogden was asked to explain the purpose of the confidentiality agreement that interview panel members sign. She said the agreements were to ensure that discussions held during the interview process remained confidential. The agreements also certify that panel members are not related to the candidate.

20. The three individuals on the panel for the position that is the subject of this appeal were Lauren Moore, Hiren Desai and Kay Kennedy.

21. Ogden was asked to explain the Executive Order, 2008-473, "Relating to Equal Employment Opportunities and Non-Discrimination in Employment in Kentucky State Government." Ogden stated that it was a "guideline we use to ensure we provide equal employment opportunities for anyone who applies to KDE." Ogden added that her office keeps track of how minority applicants are interviewed and hired by KDE, and how many minority employees leave their employment there. These figures are compiled in a report that she prepares bi-monthly. According to the report she prepared for the period November 1 to December 31, 2011, there were 81<sup>1</sup> employees designated as "minorities" working in the Department overall which accounts for 12.5 percent of total employees.

22. The goals for minority representation, Ogden testified, were set by the Personnel Cabinet at 10 percent or higher. Ogden stated KDE has not fallen below 11 percent minority representation as long as she has worked there.

23. **Lauren Moore** is Executive Advisor, Office of Administration and Support at KDE. She was one of the three members on the interview panel.

24. Moore was questioned why she did not date the Confidentiality Agreement that she signed. She stated that she signed one prior to the interviews, and a second one sometime after. To the best of her recollection, she did this because the first one had been misplaced. In any event, Moore stated she complied with the agreement and did not divulge confidential information regarding the applicants, nor did she approach the interview process with any bias toward or against any of the applicants.

25. Moore first met Susan Smith Barkley, the individual ultimately chosen for the Assistant Director position, when Barkley interviewed at KDE for a different position one week earlier.

26. Moore was on the interview panel for the open Administrative Branch Manager position which was ultimately offered to Mr. Chay Ritter. Moore explained that Ritter was already working in that branch and was very familiar with the specific work this branch

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<sup>1</sup> This number includes all Frankfort-based and Department employees, as well as contractors.

performed. The interview panel for the Administrative Branch Manager position consisted of Moore, Kay Kennedy, and Tim Cooper.

27. As for the Assistant Director, Division of District Support division job, Moore testified that the person in that position deals with three key areas of funding: “SEEK” funds, Tax Rates funding and Transportation funding. All told, the budget for this combined funding was approximately 3 billion dollars. Moore stated the analysis of the above-stated funding was very complex and involved a lot of interaction with the Governor’s office regarding allocation. It is also imperative that the Assistant Director work in close contact with all the branches within Kay Kennedy’s Division, and be able to step in for her during her absence.

28. Besides Susan Smith Barkley and the Appellant, the other candidates for this job included Robin Rhea, an employee at the Governor’s office; Grace Williams, a candidate outside state government; Ann Sampson, a KDE employee with at least 18 months state service; Karen Conway, a KDE employee with at least 2 years state service; Olivia Willoughby, a project manager with the Division, who had 4 years state service (Moore estimated); and Donald Tetrick.

29. Moore was asked about her impressions regarding the Appellant. She stated that she had minimal contact with him prior to the interview. She got “the impression he did a lot of facilities – related functions like campus improvements.” She did not feel he had a lot of budget or financial experience. Moore reviewed his application, letter of recommendation from his supervisor, and, she recalled, some e-mails that were attached to the letter. She did not review his evaluation because he had not been at KDE long enough to have been formally evaluated.

30. Of the applicants interviewed, Susan Smith Barkley, a white female, was considered the strongest. She is a C.P.A. and has experience in all areas of funding that are pertinent to this position. As an Executive Director at the West Virginia Department of Education, Barkley performed a role similar to that of Kay Kennedy, Division Director. Her interview was “excellent,” Moore stated.

31. The two other strongest candidates were Grace Williams and Robin Rhea. The interview panel was not sure if the job would have been offered to either individual, however, in the event that Barkley turned down the job.

32. **Kay Kennedy** is the Director of KDE’s Division of District Support. Kennedy stated that the Assistant Director position was vacant for a period of time prior to Barkley’s hiring due to budget constraints. In the spring of 2011, Kennedy’s supervisor, Hiren Desai, Assistant Commissioner, asked her to consider whether filling that position could supply further support for her work unit. She determined that an Assistant Director would be helpful to her, “looking at our work load and the budget.” She prepared a position description and position justification which she sent to the Human Resources department.

33. Kennedy testified that the successful applicant, Susan Smith Barkley, was given the highest score on the interview questions, which addressed the applicants' qualifications.

34. The interview panel did not submit any other names to the Human Resources department other than Barkley's "because we did not feel that there was another candidate we would offer the position to." But the two other candidates who scored highest after Barkley were Robin Rhea and Grace Williams.

35. The last interview the panel held was with Donald Tetrick on January 17, 2012. On January 19, 2012, a personnel action request to appoint Susan Smith Barkley to the Assistant Director position was completed by Angela Smith, Human Resources Administrator, and approved by Kay Kennedy the same day. Barkley accepted the position on January 20, 2012. Kennedy denied that the hiring process was uncommonly quick: "It didn't seem out of the ordinary to me," she stated.

36. Kennedy was asked why the Appellant was not contacted in person to inform him that he was not chosen for the position. Kennedy testified that she only spoke to "folks in the building - people that I could run into, or that I see on a daily basis." Appellant was informed that he was not selected for the job by a letter from Kennedy dated January 30, 2012.

37. On cross-examination, Kennedy was asked what the "ideal candidate" for the Assistant Director's position looked like. She stated that the job entailed "skill and experience dealing across the broad range of our customer base, which consists of 174 school districts."

38. Kennedy was asked how she evaluated the Appellant as a candidate. She stated that his role at KSB seems to involve primarily the maintenance of the facility and overseeing capital construction projects and managing the grounds. He had no experience with SEEK funding, tax rates, school bonds, architectural design, or the legislative bill review process. Contrasting Appellant's qualifications to Susan Smith Barkley's, Kennedy stated that Barkley had past job experience and knowledge of essentially all the tasks of the Assistant Director job. In comparison, Appellant's prior job experience was primarily in the retail sector and the military.

39. **Hiren Desai** is Associate Commissioner, Office of Administration and Support, KDE. He is responsible for the following KDE Divisions: Budget and Financial Management; Resource Management; District Support; and School and Community Nutrition.

40. Desai stated that while Kay Kennedy selected the names from the register, he reviewed the register himself to "ensure a diverse group" of applicants were interviewed. Satisfied with Kennedy's choices, he made no additions to her list of interviewees.

41. Desai was asked to refer to a chart entitled: "Kentucky Department of Education Overall and Minority Employment by Type of Employment Bureau and Office" (introduced as part of Appellee's Exhibit 3). Reading the report, Desai stated that of the 311 KDE employees

who are “Frankfort-based” 7 are identified as “Minority Males” and 27 as “Minority Females.” Desai explained that “minority” means Hispanic and non-Hispanic (Indian, Asian, and African American). As an American of Indian descent, Desai stated that he himself is in the category of “Minority Males.” The total percentage of minorities working for the KDE in Frankfort is 10.9 percent, which is slightly over KDE’s minimum minority employment goal of 10 percent. The minority goal is for all minorities, he stated, “it does not distinguish between genders.”

42. Desai testified that he did not meet Susan Smith Barkley when she interviewed a week earlier for the Assistant Branch Manager position. Desai denied that anyone had spoken to him about Barkley or recommended her for the Assistant Director position. She was chosen because he and the other two members of the interview panel (Kennedy and Moore) “jointly agreed she was the best qualified applicant.” The other two top candidates were Grace Williams and Robin Rhea, but because the panel could not reach a consensus on who was the second choice, they agreed to re-interview candidates if Barkley turned down the job offer.

43. On cross-examination, Desai was asked what kind of candidate the panel was looking for to fill the Assistant Director position. Desai stated he had specific expectations for this position. First, the candidate had to have the capacity to support the Division Director in all her functions. Additionally, the candidate must “communicate well - - firmly but politely – with legislators and school superintendents.” Another important aspect of the job is the oversight of the fiscal functions of this department. One of those functions is SEEK funding. Desai explained that it is a 2.9 billion dollar account, based on a complex equation of tax rates, property tax values and the number of pupils receiving free and reduced lunch. The fund is projected and adjusted throughout the year according to student attendance. “It is a living, breathing formula,” Desai stated. “It is over 1/3 of the entire state budget and it is incredibly complex, difficult, and sensitive.” The Assistant Director must constantly interface with school districts, legislators and the federal government regarding its management.

44. Desai was asked to enumerate Appellant’s qualifications for the position. Desai stated: “When I looked at his application, I wondered if he was qualified, but I noticed he was a veteran. I went into the interview process skeptical.” When asked: “What positive things could he [Appellant] bring to the role?” Desai answered: “I can’t think of any. When he was questioned about any complex projects he had worked on, he responded that he had completed a \$20,000 roofing project at KSB. When I compare that size project to the 2.9 billion dollar SEEK Fund, the two are worlds apart.” However, Desai conceded that Appellant was “qualified for the position but not the most qualified.”

45. As for Susan Smith Barkley, her answer to the “complex project” interview question was that she had developed an “indirect cost rate” for all school districts in West Virginia. Desai explained that when a state Department of Education applies for federal funds for specific programs, the Department can set aside a certain amount for administrative costs. This “indirect cost rate” is based on calculations that are “very complicated and must be documented.”

46. **Susan Smith Barkley** is the Assistant Director, Division of District Support, Kentucky Department of Education, a position she has held since March 2012. Barkley stated for the record that she was made aware of her right to intervene in this case but declined to do so.

47. Barkley stated that she began looking for a position in Kentucky when she got engaged in August, 2011. Barkley was engaged to a U.P.S. pilot with children younger than hers, and the couple decided that she would relocate here from West Virginia. She stated that she found the KDE positions by looking at the Personnel website.

48. Barkley was asked if anyone had acted on her behalf to assist her in her job search. She replied that Gail Bender, President of the Southeastern Association of School Business Officials, sent Barkley's résumé to the Kentucky Association of School Business Officials, but other than that no one "reached out" to her in her job search.

49. Barkley stated that the first time she met anyone from KDE was at the first interview she went to, for the Assistant Branch Manager position, which she did not get.

50. Barkley was asked what her duties as Assistant Director were regarding Health Services. She replied: "I do work with that Branch collaboratively to make sure the correct process is followed." She added that she is currently working on "revamping" it. As far as working with "Facilities," Barkley stated she verifies revenue sources for Capital Funds requests, which is the mechanism by which districts can use restricted funds for other projects. Her involvement in SEEK funding is to work with the Funding and Reporting Branch to oversee any issues they may have and to "summarize SEEK funding for distribution to other states and also to graduate students." She stated that while she works with the program, she does not have primary responsibility for its calculation.

51. Barkley was asked how she prepared for the Assistant Director interview. She responded that she did not prepare very much and, in fact, she had already accepted another job and was not even sure if she would interview for the KDE position. But the job she had accepted was more of a "sales-type" atmosphere that involved technology, while the Assistant Director job was so closely related to what she had been doing in West Virginia for the past fourteen years that she felt the transition to the KDE position would be less stressful.

52. Barkley stated that she has a B.A. in Accounting and is a Certified Public Accountant. She has one year of management experience and has supervised three employees during the course of her career, although she does not supervise anyone in her current position. Prior to accepting the Assistant Director position, she had never worked for the state of Kentucky.

53. On cross-examination, Barkley was asked to detail the duties of her job in West Virginia. She stated that she worked for the West Virginia Department of Education for fifteen years. As the Executive Director, she worked with the legislature preparing fiscal notes; she managed a funding formula of almost 2 billion dollars; she was responsible for the professional

development of financial officers and their staff. She also took leadership of financial reporting and audits for school districts.

54. Barkley testified that she had no difficulty transitioning into the Assistant Director position because of her prior experience. Barkley stated that she was the expert in school finance issues in West Virginia, and “so much translates across state lines.” The Assistant Director position has been a “really good match” for her abilities and she has received positive feedback from the people she works with.

55. The Appellant, **Kenneth Washington**, testified on his own behalf. He is the Administrative Section Supervisor for Kentucky School for the Blind (KSB), a position he has held since February 2011. Appellant described his position at KSB as essentially akin to a “Director of Operations” or a “Campus Manager.”

56. Prior to working at KSB, Appellant was a Store Manager at Dollar General. His prior positions in the last five years also include: Assistant Store Manager at K-Mart; Terminal Manager at Jack Cooper Transport, a position at Kroger.

57. His duties at KSB as the Administrative Section Supervisor include the oversight of the Operations department, including the Business Office, Maintenance Department, Housekeeping and Food Services. Appellant is also responsible for all campus facilities (15 buildings); the grounds (approximately 14 acres); facility rentals; the school’s fleet of vehicles; any donations left to the school; and several cemetery plots KSB owns.

58. Appellant addressed some of the functions of the Assistant Director and explained the experience he had performing these duties:

- Pupil Attendance: As Director of Admissions, he is responsible for enrolling the students and ensuring their attendance.
- Transportation: He oversees KSB’s fleet of vehicles which consists of two buses and three cars.
- School Calendar: As part of a four-person leadership team, he has “input” in developing the calendar for the academic year. He also posts on the internet all events taking place at the facility outside of normal school functions.
- Taxes and Bonds: As a state agency, KSB does not pay taxes. Appellant often has to contact vendors and contractors when they have improperly charged KSB sales tax. As for bonds, Appellant oversees Capital Construction Projects, including corresponding with contractors and requesting contracts from them.
- Audits: He provides an internal “checks and balances” regarding school accounts. Appellant noted that the Food Service Department – over which he has oversight – is regularly audited.

- Health Services: Appellant stated that while this department does not fall under his supervision, he is responsible for their maintenance needs, including: air quality, mold remediation and air temperature (through proper maintenance of KSB's HVAC system).
- State and Federal Statutes: Appellant and his leadership team deal with state and federal regulations regarding the population they serve – the visually impaired. “We are constantly developing policy and procedure.” Appellant added that he considers himself to be an “effective communicator on all levels.” His military experience required briefing key military officials, and in his role at Ford he “often communicated with senior management regarding transportation of their fleet of vehicles.”
- Budget/Funding Sources: Appellant stated that he decides where funds are spent (with the exception of personnel). “I decide how to allocate funds for LG&E, water, and how much the maintenance department will spend.” Appellant testified that his operations budget is approximately 1.3 million dollars.

59. Appellant addressed the interview for the Assistant Director position. He stated that the interview panel consisted of Lauren Moore, Kay Kennedy and Hiren Desai. Another employee, Viembre Nicholson, was present but she did not ask any questions of the applicants.

60. Appellant stated that the interview lasted an hour. He felt that the questions were “fairly general.” He said he answered them to the best of his abilities, and attempted to relate his answers to his past job experiences. There was no question that “stumped” him: “I provided clear, concise answers . . . the interview went well. I left feeling very positive.” In addition to his state application, Appellant included “four or five emails from peers I have worked with, thanking me or commending me for the job I do at KDE.”

61. Appellant stated he had supervised over 200 people during the course of his career, and currently supervises 18 people. He has seven to eight years of management experience.

62. Appellant stated he did not believe KDE did its “due diligence” regarding Affirmative Action. “Looking at the statistics as it applies to minority males, that population is not given the same opportunity as everyone else.

63. On cross-examination, Appellant was asked if he had ever hired a minority male at KSB. He responded: “We recommended one for hire, but found out he couldn't accept the position. He got arrested.” When queried if only recommending one minority male meant Appellant was discriminating, Appellant answered: “No, I don't recall interviewing many minority males. I'm thinking he was the only one who interviewed.”

64. Appellant stated that he felt the interview process was unfair because Susan Smith Barkley was allowed to interview for two positions within the same week. “That shouldn’t happen,” Appellant said. “It gives that candidate an advantage. The two members of the interview panel who participated in the first interview should have recused themselves.”<sup>2</sup>

65. Appellant was asked about the circumstances surrounding his hire for the position he currently holds at KSB. He stated that he was aware that another candidate, Kathy Jennings, a white female with over 20 years experience in state government, interviewed for the position. Appellant, with no state government or school district experience was hired over Jennings. Appellant was asked: “You were hired over an internal candidate - - was that fair?” Appellant answered, “Probably not.”

66. At the end of Appellant’s testimony, Appellant rested his case.

67. Counsel for Appellee made a Motion for Directed Verdict on all issues. The motion was **GRANTED** only on Appellant’s claim of political discrimination, as no evidence was presented regarding this issue.

68. Appellee called its first rebuttal witness. **Angela Smith** is a Human Resource Administrator with KDE. Smith was involved in the process of helping to establish the Assistant Director position and getting it filled. Smith testified that the position was posted on both the KDE and Personnel Cabinet website. The closing date for submitted applications was December 12, 2011. She pulled the register three days later. The list was submitted to Kay Kennedy, the Hiring Manager, for her to determine which applicants to interview. Five veterans were offered interviews (two declined); five “competitive” candidates, that is, those working outside state government, were offered interviews (two declined).

69. Smith stated she did communicate with Susan Smith Barkley during the hiring process. Specifically, she provided Barkley with instructions on how to apply. Smith stated it was not unusual for her to help applicants in this way, and, in fact, Angela Smith’s name is listed on the job postings website as the Agency contact.

70. As for choosing a member of the interview panel, Smith testified that “any individual who has working knowledge of the position, what the job tasks are” is appropriate. It is up to the Hiring Manager to determine the panel. Smith said there was nothing unusual with Lauren Moore and Kay Kennedy sitting on the panels for both the Assistant Branch Manager and Assistant Director positions.

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<sup>2</sup> Lauren Moore and Kay Kennedy participated in both the Assistant Branch Manager and Assistant Director interviews.

71. The selection of Susan Smith Barkley for the Assistant Director position was made on January 18, 2012. Angela Smith then submitted the EEO Form and routed another form containing Barkley's name, the effective date of her hire and salary offered, to the Budget Department for their final approval. Smith contacted Barkley as soon as "Budget approved" her hire. This occurred the next day, January 19, 2012.

72. On cross-examination, Smith denied that there was anything unusual about the "quick turn-around" between the panel's choosing the successful applicant and the formal offer of employment made to Barkley.

73. Smith was asked if it was unusual for an external candidate to interview for two jobs within KDE in one week. Smith answered, "I always tell candidates to apply for each individual vacancy they want to be considered for. If a person is actively applying for jobs, this is not uncommon. It just depends on the timing."

74. Smith was asked when a register is deemed "Internal Mobility" only. She stated that only occurs when a position requires specific knowledge that only a current state employee would have. "The majority of the registers I request are competitive," Smith stated.

75. **Lynn McGowan-McNear** is Division Director, Division of Human Resources. Her job duties include the oversight of Human Resources and Fiscal Resources at KDE.

76. McNear was asked if KDE's "Division of Resource Management" policy regarding the proper process for filling a KDE vacancy was followed in hiring Susan Smith Barkley for the Assistant Director position. She stated that the relevant portion governing this issue is titled in the policy (introduced as Appellee's Exhibit 17) as "Hiring KRS 18A Merit Positions ONLY – REQUIRE A REGISTER – competitive or promotional," and that it was properly followed.

77. As for what steps are built into the hiring process to ensure fairness to minorities, McNear stated that KDE's policy is to have at least one minority on the interview panel, and noted that applicants can now identify their minority status on their state application, if they desire. Additionally, Viembre Nicholson, an HR Specialist, was present at the interviews as an observer. "If someone asked an inappropriate question," McNear stated, "Viembre was present to address that."

78. McNear was asked to address the "Hiring Report," specifically why there were no minority males in certain areas like "support staff." McNear answered that office support positions are primarily secretarial jobs and traditionally females apply for these. "These tasks may not be attractive to males. I think we go above and beyond in hiring minorities. We are

proactive in having three members on an interview panel, and always have one minority on that panel. We have been recognized by the Personnel Cabinet for our diversity.”

79. **Viembre Nicholson** is a Human Resource Specialist III. She stated that her role in the hiring of the Assistant Director was that of an observer. Nicholson explained: “The Commissioner directed the Human Resource Department to monitor the interview process, to make sure the interviews were going as they were supposed to.”

80. Nicholson stated that the two minorities interviewed were Appellant and Grace Williams. They are both African-American.

81. Nicholson stated that Kay Kennedy explained the job duties and expectations to each interviewee. She also asked the same questions to each individual. Nicholson testified that nothing occurred during the interviews to lead her to believe one applicant had an unfair advantage. She did add that in her estimation, Susan Smith Barkley was the best candidate. “She had prior experience in exactly what the position does.”

82. As for Appellant, Nicholson stated that he “didn’t quite understand the questions – he didn’t show that he was the best candidate.”

83. Nicholson was asked if she had any reason to believe Barkley had been pre-selected. She responded: “No, if I had thought that, I would have screamed from the highest mountain. I would not have kept my mouth shut.”

84. KRS 18A.0751(4)(f) states:

For promotions which shall give appropriate consideration to the applicant's qualifications, record of performance, conduct, and seniority. Except as provided by this chapter, vacancies shall be filled by promotion whenever practicable and in the best interest of the service.

85. 101 KAR 1:400, Section 1(1) reads:

Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion.

### **FINDINGS OF FACT**

1. Appellant is employed as Administrative Section Supervisor, Division of District Support, Kentucky School for the Blind, a position he has held since February 1, 2011.

2. In December 2011, Appellant applied for the position of Assistant Director, Division of District Support. He interviewed for the position on January 13, 2012.

3. The interview panel consisted of Lauren Moore, Hiren Desai and Kay Kennedy. According to KDE policy, one member of the interview panel must be a minority, which on this panel was Hiren Desai, who identified himself as a “minority male.” (He is of Indian descent.)

4. In addition to Susan Smith Barkley and the Appellant, the panel interviewed the following individuals: Robin Rhea (an employee in the Governor’s office), Grace Williams (a minority female outside state government), Ann Sampson (a KDE employee with approximately 18 months state service), Olivia Willoughby (a Project Manager within the Division with four years state service), and Donald Tetrick. Each applicant was asked the same interview questions.

5. The position of “Assistant Director” deals with three key areas of funding: “SEEK” funds, Tax Rates fundings and Transportation funding. All told, the budget for this combined funding is approximately 3 billion dollars (Testimony of Lauren Moore). The position, as described by all the witnesses familiar with it, involves complex analyses, involvement with legislators, the Governor’s office and school district superintendents, as well as interaction with all branches within Director Kay Kennedy’s division.

6. Susan Smith Barkley, an outside candidate who had worked as the Executive Director at the West Virginia Department of Education for the past fourteen years, was unanimously selected for the job by the interview panel. The two “runners up” were Robin Rhea and Gale Williams.

7. By all accounts, Appellant was not seen as a “good fit” for the position by any member of the panel. Mr. Desai testified: “When I looked at his application, I wondered if he was qualified, but I noticed he was a veteran. I went into the interview process skeptical. . . When he was question about any complex projects he had worked on, he responded that he had completed a \$20,000 roofing project at KSB. When I compare that size project to the 2.9 billion dollar SEEK Fund, the two are worlds apart.”

8. Appellant described his own position at KSB as essentially a “Director of Operations” or a “Campus Manager.” His duties at KSB are the general oversight of the Operations Department, including the Business Office, Maintenance Department, Housekeeping and Food Services. Appellant stated he was responsible for all campus facilities: 15 buildings, the grounds (approximately 14 acres), facility rentals, the school’s fleet of vehicles, as well as any donations to the school and several cemetery plots.

9. While Appellant’s supervisor, Soraya Matthews, testified that his job performance was “really good,” at the time the Assistant Director job was posted (December 2011), Appellant had not worked at KSB long enough to have had a formal job performance evaluation.

10. Appellant's educational background was a B.A. in Organization Communication (identified by Appellant as "H.R.") from McKendree University, and a Masters in Business Administration from the University of Phoenix. His work experience was varied and began in the military. His jobs preceding his employment at KSB within the past 5 years included Store Manager (Dollar General), Assistant Store Manager (K-Mart), Terminal Manager (Jack Cooper Transport), and a stint at Kroger (the title of his position was not identified on his state application). Appellant was not employed at any of these jobs for longer than a year and a half (Appellee's Exhibit 8).

11. The successful candidate, Susan Smith Barkley, has a B.A. degree in Accounting from the University of Charleston, and is a Certified Public Accountant. In her role as Executive Director, West Virginia Department of Education, she was responsible for working with the West Virginia legislature in preparing fiscal notes and managing a school funding formula for a budget of approximately 2 billion dollars. She was also responsible for financial reporting and audit of West Virginia school districts. She held this job for over 14 years. Barkley testified that her job in West Virginia was similar to the job she now holds as Assistant Director, and the transition to the KDE has been fairly seamless.

12. As for Appellant's claim of racial and gender discrimination, Appellant bases these claims on his assertion that "minority males were not given the same employment opportunities as everyone else."

13. The KDE Minority Employment Report (Appellee's Exhibit 3), notes under "Department Summary" that in the area of Frankfort-based employee totals, there are no minority males working in "support" roles, while there are 14 minority females so employed. Lynn McGowan-McNear, Division Director of Human Resources, explained that office support positions are primarily secretarial jobs and traditionally only females apply for these. Overall, KDE's "Department Totals" for minority hires is 10.9 percent for Frankfort-based positions and 12.5 percent overall. These numbers are consistent with the 10 percent minority goal for all state government (Appellee's Exhibit 3).

14. By statutory mandate, appropriate consideration must be given to the applicant's qualifications, record of performance, conduct and seniority."<sup>3</sup> While Appellant had more seniority than the successful candidate, no evidence was presented regarding the Appellee's alleged failure to consider the factors of record of performance or conduct. As for qualifications, the evidence of record amply demonstrated that Barkley was the superior candidate. In addition to having a B.A. degree in Accounting, she was also a CPA. Most importantly, she had been successfully employed by the West Virginia Department of Education in a job very similar to the Assistant Director position at KDE. She had been employed in that capacity for fourteen years. Appellant, on the other hand, had worked at KSB for under a year, and was more – by his own

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<sup>3</sup> 101 KAR 1:400 adds a fifth factor "performance evaluations" to be considered in promotions, but Appellant had not been employed long enough at KSB to have had one completed.

admission – a Facilities Manager than a manager of complex and technical financial data, which is a large function of the Assistant Director’s job.<sup>4</sup>

15. As the burden of proof was on the Appellant to demonstrate that appropriate consideration was not given to the mandated promotional factors, the Hearing Officer finds that this burden was not met and the Appellee prevails on this claim.

16. The evidence of record does not substantiate Appellant’s claim of race discrimination. While the KDE’s Frankfort office does not currently employ any minority males in the area of “support,” Appellee offered credible evidence that minority males have not historically applied for jobs in this section as they are primarily secretarial. Appellant has offered vague assertions that Appellee had not done its “due diligence regarding Affirmative Action,” but the evidence showed that the KDE had actually surpassed the targeted hiring goal for minority employment in state government.<sup>5</sup>

17. Appellant failed to satisfy his burden of proof to show that his failure to be promoted to the Assistant Director position was based on discrimination.

### **CONCLUSIONS OF LAW**

1. The failure to promote Appellant to the position of Assistant Director, Division of District Support, was not a violation of KRS 18A.0751(4)(f) as implemented by 101 KAR 1:400.

2. The Appellee did not engage in racial or political discrimination against the Appellant.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **KENNETH WASHINGTON V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2012-049)** be **DISMISSED**.

### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on

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<sup>4</sup> At the time he applied for the Assistant Director position, Appellant had approximately ten months state service; Barkley, a “competitive” candidate, had none.

<sup>5</sup> The targeted hiring goal for minority employment in all state government is 10 percent based on the 2000 census data for Kentucky. The KDE’s overall department totals for minority employment is 12.5 percent (Appellee’s Exhibit 3).

which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer Colleen Beach** this \_\_\_\_\_ day of November, 2012.

**KENTUCKY PERSONNEL BOARD**

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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof mailed this date to:

Hon. Lisa K. Lang  
Kenneth Washington